15-6326-16965-CV

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Bob Fine,

Complainant,

vs.

Jim Bernstein,

Respondent.

ORDER ON MOTION FOR PARTIAL SUMMARY DISPOSITION AND MOTION TO STAY PROCEEDINGS

The above-entitled matter came before the panel of Administrative Law Judges on the Respondent's motion to dismiss and motion to stay pending appeal. Respondent filed his motions on December 14, 2005. The Complainant filed a response to the motions on December 26, 2005, and the record with respect to the motions closed on that date.

Bob Fine ("Complainant"), 3932 York Avenue South, Minneapolis, MN 55410, represented himself without counsel. Alan Weinblatt, Weinblatt & Gaylord, PLC, 111 East Kellogg Boulevard, St. Paul, MN 55101, represented Jim Bernstein ("Respondent ").

Based upon all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

IT IS ORDERED:

1. That Respondent's motion for partial summary disposition is GRANTED; and the Respondent's motion for a stay of proceedings is DENIED;

2. That by January 23, 2006, the parties shall submit written argument concerning what additional penalty, if any, is warranted concerning the Respondent's additional dissemination of statements previously found to violate Minn. Stat. § 211B.06 in the November 7, 2005, Order in *Fine v. Bernstein*, OAH Docket No. 12-6326-16910; and

3. The hearing in this matter scheduled for January 23, 2006, is hereby canceled.

Dated: January 9, 2006

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Presiding Administrative Law Judge

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Complainant is currently the Minneapolis Park & Recreation Board Commissioner representing District 6. In the November 8, 2005, general election, he was the incumbent candidate running for re-election, and the Respondent was his only opponent. On October 12, 2005, the Complainant filed a complaint with the Office of Administrative Hearings alleging the Respondent had violated Minn. Stat. §§ 211B.04 and 211B.06. After a hearing, a panel of three Administrative Law Judges found that the Respondent did violate Minn. Stat. § 211B.06 with respect to certain campaign material and by Order dated November 7, 2005, assessed a civil penalty against the Respondent in the amount of $800.[1]

On November 14, 2005, the Complainant filed a second complaint alleging additional violations of Minn. Stat. § 211B.06 by the Respondent. Specifically, the complaint alleges the following: (1) the Respondent placed an advertisement in the October 24, 2005, edition of the *Southwest Journal* newspaper (Exhibit A) that contained the three statements the panel found to be false in its November 7th Order;[2] (2) the Respondent placed another advertisement in the November 7, 2005, edition of the *Southwest Journal* newspaper (Exhibit B) that contained the three statements the panel found to be false in its November 7th Order;[3] (3) the Respondent prepared and distributed a campaign flyer (Exhibit C) on or about November 5, 2005, that contained two of the three statements the panel found to be false;[4] (4) the Respondent distributed a campaign flyer on or about November 5, 2005 (Exhibit C) that contains the following additional false statements: "consider cuts in wading pools and portable toilets. Fine – Yes," "Subvert the fair hiring process to give classmate a job. Fine – Yes," and "$14 million Neiman Sports Complex: Began as a $6 million project, is underused and was built on leased land;" (5) the Respondent violated Minn. Stat. § 211B.06 by failing to include in his campaign flyer (Exhibit C) the complete quote from the *Star Tribune* editorial dated November 2, 2005, (Exhibit D) regarding its decision not to endorse either the Complainant or the Respondent for District 6 Park Board; and (6) the Respondent made the following false statements in a questionnaire "intended to be distributed" by the Children's Advocacy Network (Exhibit E): "Reducing hours, selling park land, closing facilities are simply not acceptable! My opponent is willing to do those things."

On November 16, 2005, Administrative Law Judge Beverly Jones Heydinger concluded that the complaint alleged prima facie violations of Minn. Stat. § 211B.06 with respect to the three statements identified in Exhibits A and B, which are the identical statements found to violate Minn. Stat. § 211B.06 in the panel's November 7, 2005, Order. ALJ Heydinger also found that the complaint alleged prima facie violations of Minn. Stat. § 211B.06 with respect to the two

statements identified in Ex. C regarding funding for speedy removal of infected trees and funding and finishing Lake of the Isles restoration, which are nearly identical to the statements found to violate Minn. Stat. § 211B.06 in the panel's November 7, 2005, Order. Administrative Law Judge Heydinger concluded further that since there had already been a ruling that Respondent violated Minn. Stat. § 211B.06 by preparing and disseminating campaign material that contained the statements identified in Exhibits A, B and C, the only issue for the panel to consider with respect to this new complaint was whether the wider distribution of these statements warranted an additional penalty.

Administrative Law Judge Heydinger also found that the complaint alleged prima facie violations of Minn. Stat. § 211B.06 with respect to the following statements in Exhibit C: "Consider cuts in wading pools and portable toilets. Fine - Yes;" and "Subvert the fair hiring process to give classmate a job. Fine – Yes." ALJ Heydinger dismissed the remaining allegations in the complaint for failing to establish prima facie violations of Minn. Stat. § 211B.06.

On December 14, 2005, the Respondent brought this motion to dismiss and motion to stay pending the appeal of the panel's November 7, 2005 Order.

"Consider cuts in wading pools and portable toilets. Fine – Yes."

In 2003, the Park Board considered cutting approximately $3.5 million from its operating budget due to reductions it was facing in state and local government aid.[5] At a March 19, 2003, Park Board meeting, the Board considered cutting funding for 24 of 52 wading pools and 92 portable toilets. Complainant was the presiding officer and President of the Park Board at the time of the voting on these matters and was present at the meeting. By voice vote, the Board adopted the cuts in wading pools and portable toilets as part of an overall package of service reductions.[6] As President, the Complainant did not vote. (The President of the Park Board only votes on matters in the event of a tie.) However, he also made no objection.[7] After the cuts were announced, the Complainant and other Park Board Commissioners received a high volume of calls from citizens opposed to the cuts in wading pools and portable toilets.[8] In an article that appeared in the April 3, 2003, edition of the *Southwest Journal*, the Complainant stated that "The board would reconsider the wading pool cut April 2 . . . or Wednesday, April 9."[9] The Complainant also said, however, that "The impact of the state's budget deficit, coupled with our sluggish economy, means that deep cuts must be made."[10] At the April 16, 2003, Park Board meeting, which the Complainant did not attend, Park Board Commissioner John Erwin made a motion to restore the funding using salary savings from vacant positions.[11] The motion failed by a vote of 2 to 6.[12] By May 15, 2003, the Park Board reconsidered the cuts and voted to restore funding for the wading pools and portable toilets.[13]

Respondent argues that the panel should dismiss the Complainant's claim regarding the statement "consider cuts in wading pools and portable toilets" because Complainant did in fact consider such cuts. The issue of cutting funding for portable toilets and wading pools came before the Complainant as President

of the Park Board several times in early 2003. The Board not only considered cuts but did in fact cut funding for portable toilets and wading pools at its March 19, 2003 meeting. In addition, the Complainant later told a reporter with the *Southwest Journal* that the Park Board would "reconsider" the cuts at a subsequent meeting. Respondent argues that he rationally deduced that Complainant was willing to consider cuts in wading pools and portable toilets based on his prior conduct and statements. Respondent maintains that such a deduction or inference is not a false statement of fact and is not within the purview of Minn. Stat. § 211B.06.

Complainant admits that the Park Board considered reductions in its operating budget in 2003, which included proposed cuts in wading pools and portable toilets. Complainant contends, however, that he objected to the cuts in wading pools and portable toilets in discussions with other Board members and at Board meetings. In addition, the Complainant points out that, as the President of the Park Board, he did not vote for the cuts because there was no tie. Finally, Complainant maintains that he led efforts to restore most of the cuts in service after the March 2003 vote.

"Subvert the fair hiring process to give classmate a job. Fine – Yes."

In May of 2003, the Park Board began a nation-wide search for a new Superintendent to fill the position being vacated by then current Superintendent Mary Merrill Anderson as of December 31, 2003. The search resulted in a pool of seven candidates, out of which the Board identified two finalists. By mid-December, however, the two finalists for the position withdrew their names from consideration. Sometime in mid-December, the Complainant contacted the remaining five candidates and four indicated they were still interested in being considered for the position.[14]

On December 17, 2003, however, a five-member majority of the Park Board (including the Complainant) voted to hire Jon Gurban as the new interim Minneapolis Superintendent of Parks.[15] Gurban was the executive director of the Minnesota Recreation & Park Association at the time, and he and the Complainant had been high school classmates. Gurban had not applied for the position of Superintendent, and he had not been interviewed for the job. The vote to hire Gurban came at the close of a chaotic Park Board meeting in which the commissioners who voted against Gurban's appointment accused those voting for him of circumventing the Park Board's hiring process and making decisions outside of the Park Board meeting.[16] According to the minutes of the meeting, Gurban's resume was distributed to the Park Board Commissioners only after Commissioner Dziedzic moved to authorize the Complainant to negotiate a contract with Gurban and only minutes before the vote.[17] Commissioners Erwin, Mason, Berry Graves, and Young strongly objected to the Board considering Gurban when he had not applied for the position and had not completed any of the management tests or background checks that the other applicants were required to complete.[18] In addition, the four Commissioners complained that they did not know Gurban, and they stated that it was

inappropriate for the Board to abandon the hiring process when four candidates still remained.[19] The unusual manner in which Gurban was hired and the outrage expressed by Board members and citizens who viewed it as a circumvention of the hiring process was widely covered in the *Star Tribune* and *Pioneer Press*.[20]

Respondent argues that the statement, "subvert the fair hiring process," reflects his opinion of the Board's and Complainant's hiring of Jon Gurban and does not violate Minn. Stat. § 211B.06. Given the unusual manner in which Gurban was hired, Respondent formed the opinion that the Complainant and other Park Board members circumvented or subverted the Board's hiring process. That is, Respondent felt that when it came to Gurban, the Board did not follow the hiring process it had established for the other candidates. Respondent also argues that the Complainant cannot show by clear and convincing evidence that the statement is false or that Respondent knew the statement was false or acted with reckless disregard as to its truth or falsity.

Complainant argues that he did not subvert the fair hiring process with respect to hiring Jon Gurban as Interim Superintendent of Parks. Complainant maintains that because the Board needed to fill the position by January 2004, the Board voted to hire Gurban as an Interim Superintendent for one year even though Gurban had not applied for the position, had not been interviewed, and had not taken tests that the other applicants were required to take. Complainant contends that he did nothing to "subvert" the hiring process and that Respondent either knows that such a statement is false or he communicated it with reckless disregard as to its falsity. Complainant states that he will testify at the hearing that he personally spent substantial time trying to keep the two finalists from withdrawing their names and that he merely voted for Gurban as an interim superintendent.

Motion Standard

As an initial matter, the panel of Administrative Law Judges finds that Respondent's motion, although labeled a motion to dismiss, is more appropriately treated as one for summary disposition. When matters outside the pleadings are presented for consideration, the motion must be reviewed under a summary judgment standard.[21] In this case, Respondent has attached several exhibits to his motion. Accordingly, the panel will review this matter as a motion for summary disposition.

Summary disposition is the administrative equivalent to summary judgment.[22] Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.[23] A genuine issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case.[24] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[25]

The moving party must demonstrate that no genuine issues of material fact exist.[26] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.[27] It is not sufficient for the nonmoving party to rest on mere averments or denials; it must it must present specific facts demonstrating a genuine issue for trial.[28] When considering a motion for summary judgment, the Judges must view the facts in the light most favorable to the non-moving party.[29] All doubts and factual inferences must be resolved against the moving party.[30] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[31]

False Campaign Material

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material that refers to the personal or political character or acts of a candidate. In order to be found to have violated this section, a person must intentionally participate in the preparation and dissemination of false campaign material that the person knows is false or communicates with reckless disregard as to whether it is false.

In *Kennedy v. Voss,*[32] the Minnesota Supreme Court observed that the statute is "directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from the candidate's conduct."[33] In that case, a candidate used an incumbent's "no" vote on a county budget vote to infer that the incumbent did not support any of the individual items in that budget. In fact, the incumbent did support a number of the individual items, but voted "no" because the budget included an additional $18,000 appropriation, which the incumbent opposed. The Minnesota Supreme Court held that inferences based on fact (in this case, the incumbent's "no" vote) did not come within the purview of the statute even if the inferences are "extreme and illogical."[34] The Court pointed out that the public is protected from such extreme inferences by the candidate's ability to rebut remarks during the campaign process.[35]

A challenged statement's specificity and verifiability, as well as its literary and public context, are factors to be considered when distinguishing between fact and opinion.[36] The statement that must be proved false is not necessarily the literal phrase published but rather what a reasonable reader would have understood the author to have said; expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand the statement is not a representation of fact.[37]

Finally, the term "reckless disregard" is not defined in the statute. When considering the predecessor to this statute, the Minnesota Court of Appeals, in *State v. Jude,*[38] rejected the argument that section 211B.06 could constitutionally create an ordinary or gross negligence standard. Instead, the court in *Jude* held that a criminal sanction could only be imposed for political speech that meets the "actual malice" standard of *New York Times Co. v. Sullivan.*[39] That is, the statement must be made with knowledge that it is false

or with reckless disregard of whether it is false or not. The court explained further that the phrase "reckless disregard" involved a subjective element of "actual conscious disregard of the risk created by the conduct."[40] In order to establish reckless disregard, there must be sufficient evidence that Respondent entertained serious doubts as to the truth of a statement, but published the statement anyway.[41]

Following the *Jude* decision, the Minnesota Legislature amended Minn. Stat. § 211B.06 in 1998 to incorporate the "reckless disregard" standard of *Sullivan*. Thus, it appears that the legislature intended, in accord with *Jude*, to require that complainants show by clear and convincing evidence that a statement is false and that respondents either knew it was false or acted with actual conscious disregard of whether it was false or not, in order to establish a violation of Minn. Stat. § 211B.06.

Based on the evidence submitted by the Respondent, including Park Board meeting minutes and newspaper articles, the panel concludes that the statement "consider cuts in wading pools and portable toilets," is not a false statement of fact. As President of the Park Board in 2003 when voting on these matters took place, Complainant certainly "considered" these cuts even if he did not vote on them. Complainant even told a reporter from the *Southwest Journal* that the Board would "reconsider" the cuts after the initial vote took place. Like *Kennedy v. Voss*,[42] the statement that Complainant will consider cuts in wading pools and portable toilets is an inference based on fact and does not come within the purview of the statute. The Complainant alleged that he "not only was against such cuts but actively sought numerous times to restore those cuts after the Board made them and finally had them restored."[43] Even assuming the truth of such evidence, it does not make the published statement a false statement of fact. Respondent's motion for summary disposition with respect to this allegation is granted.

The panel also concludes that the statement, "subvert the fair hiring process to give classmate a job," is an opinion based on the actions of the Park Board in hiring Gurban and is not a false statement of fact. The word "subvert" is defined to mean to "undermine," "corrupt" or "overthrow completely."[44] Based on the minutes of the Park Board meeting and the subsequent negative media coverage regarding the hiring of Gurban, Respondent formed the opinion that the Complainant and the Park Board did not use a fair hiring process when hiring Gurban. Stating that Complainant subverted the fair hiring process is simply an unfavorable deduction on the part of the Respondent based on Complainant's conduct in voting for a person who did not apply or interview for the job. Such a deduction, even if extreme and illogical, is not prohibited by Minn. Stat. § 211B.06.[45] The statute is directed against false statements of fact, not criticisms or unfavorable deductions.

In response to the motion to dismiss this allegation, Complainant offers a general denial that he subverted the hiring process and explains the circumstances surrounding the 2003 search for a superintendent. Complainant also states that he would present oral testimony at the hearing regarding his

efforts to keep the two superintendent finalists from withdrawing their names. Even assuming the truth of such evidence, it does not make the published statement a false statement of fact. Respondent's motion to dismiss this allegation is granted.

The remaining issue before the panel is what, if any, additional penalty should be assessed against Respondent for his additional dissemination of statements found to be in violation of Minn. Stat. § 211B.06 in the November 7, 2005, Order in *Fine v. Bernstein*, OAH Docket No. 12-6326-16910. The Respondent has not moved for summary disposition on the penalty issue, but he has moved for a stay in proceedings pending the outcome of his appeal of the November 7, 2005 order. The motion for a stay is denied. Although the panel is not inclined to assess an additional penalty for statements published before the date of the prior order, the panel will permit the parties to submit written argument concerning what, if any, additional penalty should be assessed. The hearing previously scheduled for January 23, 2006, is canceled.

B.J.H., B.L.N., K.D.S.

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[1] *Fine v. Bernstein*, OAH File No. 12-6326-16910-CV (November 7, 2005, Findings, Conclusions and Order). (The panel found the Respondent violated Minn. Stat. § 211B.06 with respect to three statements related to the Lake of the Isles restoration project, an alleged Superintendent slush fund, and funding for speedy removal of trees infected with Dutch Elm disease.)
[2] *Id*.
[3] *Id*.
[4] *Id*. (The statements relate to the Lake of the Isles project and funding for removal of trees infected with Dutch Elm disease.)
[5] Complainant's Response Brief at 1; Respondent's Ex. 1.
[6] Respondent's Ex. 2.
[7] Respondent's Ex. 2.
[8] Respondent's Exs. 1 and 3.
[9] Respondent's Ex. 1.
[10] Respondent's Ex. 1.
[11] Respondent's Ex. 4.
[12] Respondent's Ex. 4.
[13] Respondent's Ex. 3.
[14] Complainant's Exs. 2 and 3.
[15] Complainant's Ex. 2.
[16] Respondent's Ex. 10; Complainant's Ex. 2.
[17] Complainant's Ex. 2.
[18] Complainant's Ex. 2.
[19] Complainant's Ex. 2.
[20] Respondent's Exs. 5–10.
[21] *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 184-85 (Minn. 1999); *Cummings v. Koehnen*, 556 N.W.2d 586, 588 (Minn. App. 1996); Minn. R. Civ. P. 12 and 56.
[22] Minn. R. 5500(K) (2004).
[23] Minn. R. Civ. P. 56.03 and Minn. R. 5500 (K) (2004).
[24] *Highland Chateau v. Minnesota Dept. of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984), *rev. denied* (Minn. February 6, 1985).
[25] Minn. R. 1400.6600.
[26] *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

[27] *Highland Chateau*, 356 N.W.2d at 808.
[28] Minn. R. Civ. P. 56.05.
[29] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
[30] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[31] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250-51 (1986).
[32] 304 N.W.2d 299 (Minn. 1981).
[33] 304 N.W.2d 299 (Minn. 1981) (discussing predecessor statute, Minn. Stat. § 210A.04).
[34] 304 N.W.2d at 300.
[35] *Id*.
[36] *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).
[37] *Jadwin v. Minneapolis Star and Tribune*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).
[38] 554 N.W.2d 750 (Minn. App. 1996).
[39] 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964).
[40] 554 N.W.2d at 754, *citing,* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995).
[41] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
[42] 304 N.W.2d 299 (Minn. 1981).
[43] Attachment to Complaint at ¶ 8.
[44] American Heritage Dictionary, 1355 (3rd ed. 1993).
[45] *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).